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SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)

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FEDERAL COURT (PUTRAJAYA) — CASE NO BKA-1–01 OF 2021(W)
TENGKU MAIMUN CHIEF JUSTICE, ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), ZAWAWI SALLEH, VERNON ONG, ZALEHA YUSOF, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
21 FEBRUARY 2022

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Constitutional Law — Legislation — Validity of impugned legislation — Selangor State Legislative Assembly ('SSLA') enacted law giving Syariah High Court power to hear applications for judicial review of decisions made by bodies under statute governing administration of religion of Islam — Whether SSLA did not have power to make such law pursuant to item 1 of State List in Ninth Schedule of Federal Constitution — Whether the enacted law was unconstitutional and null and void — Whether power to carry out constitutional or statutory judicial review belonged exclusively to the Federal Civil Superior Courts — Whether State-created Syariah Courts had no power to exercise judicial review

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The petitioner ('SIS'), a company incorporated under the Companies Act 1965, had filed a judicial review application in the High Court to challenge the validity of a Fatwa that was, inter alia, made against it. The High Court dismissed the application on the ground that it had no jurisdiction to hear the matter in the light of s 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the ARIE') read with art 121(1A) of the Federal Constitution ('the FC'). Vide the instant petition, SIS sought a declaration that s 66A of the ARIE was invalid, unconstitutional and null and void because the Selangor State Legislative Assembly ('SSLA') had legislated on a matter with respect to which it had no power to legislate pursuant to item 1 of the State List in the Ninth Schedule of the FC. Section 66A provided that 'The Syariah High Court may, in the interest of justice, on the application of any person, have the jurisdiction to grant permission and hear the application for judicial review on the decision made by the Majlis or committees carrying out the functions under the Enactment'. The 'Majlis' referred to in the provision was the intervener in this petition ('MAIS'), a body established by the ARIE, while the 'committees' referred to included the State Fatwa Committee. Both the respondent and MAIS maintained that s 66A was constitutionally valid. SIS, however, argued that: (a) the phrase 'persons professing the religion of Islam' in item 1 of the State List must of necessity refer to natural persons and not artificial persons and, therefore, the Syariah High Court in s 66A could not have judicial review jurisdiction over MAIS even if it was defined as a 'Muslim'

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under s 2 of the ARIE; and (b) art 121(1) of the FC vested the judicial power of the Federation in the two High Courts — essentially the Civil Superior Courts established under Part IX of the FC — and therefore only the Civil Superior Courts had exclusive power to exercise judicial review (whether constitutional or statutory/administrative) whereas the State-legislated Syariah Courts did not have that power as was evident in item 1 of the State List. The respondent and MAIS contended that the term 'judicial review' in s 66A of the ARIE did not have the same meaning it had under civil law and was intended to give the Syariah High Court supervisory powers only in respect of matters concerning Syariah law. This, it was submitted, was consonant with item 1 of the State List which, inter alia, permitted the making of legislation relating to the 'constitution, organisation and procedure' of Syariah Courts. MAIS, in addition, took the position that judicial review was simply procedural in nature, that the power to exercise it was conferred by statute and that it was neither expressly provided for in the Federal Constitution nor originated from any inherent judicial power of the court.

Held, unanimously allowing the petition and granting the declaration prayed for:

(1) The substantive jurisdiction of the Syariah Courts was strictly defined by item 1 of the State List, Ninth Schedule of the Federal Constitution. Item 1 was not only an enabling provision but it also established the limits to what it enabled. Item 1 allowed the State Legislature to enact laws that established and conferred Syariah Courts with the jurisdictions referred to in item 1 and that too, only over persons professing the religion of Islam. The Syariah Court could therefore only become seized with those jurisdictions that were conferred upon it by the State law or laws and only those jurisdictions which item 1 allowed. The power of judicial review or the power to grant public law remedies was noticeably absent in item 1 of the State List. Section 66A as it stood was therefore incapable of being founded on item 1 of the State List as it conferred power on the Syariah Courts far beyond what item 1 of the State List permitted. Section 66A was therefore unconstitutional and void as it was a provision the SSLA had no power to make (see paras 55, 58, 68 & 93).

(2) The words used in item 1 of the State List could not be stretched beyond their base or primary meaning and beyond the context in which they appeared. The words 'constitution, organisation and procedure of Syariah Courts' had to be appreciated in context. To 'constitute and organise' merely meant to create or establish the Syariah Courts in their different tiers. The respondent appeared to have combined the phrase 'constitution, organisation and procedure of Syariah Courts' with the words 'Islamic law and personal and family law of persons professing the

religion of Islam' to contend that the SSLA had power to enact s 66A of the ARIE in the way it was worded because it was only in respect of Muslims (see paras 56–57).

(3) The respondent and MAIS contended that the Syariah Courts were entitled to engage in judicial review on the pretext that they were allowed to adjudicate on matters relating to 'Hukum Syarak'. But s 66A did not relate to purely doctrinal matters or those relating to the religion of Islam or 'Hukum Syarak'; rather, it conferred powers wider than what could reasonably be encompassed within the words 'Islamic law and personal and family law of persons professing the religion of Islam' in item 1 of the State List. On the face of it, s 66A, among other things, concerned the public law powers of MAIS. The powers of MAIS, defined in s 7 of the ARIE, tread quite clearly into the realm of public law and involved public law powers. They transcended what could reasonably be considered as doctrinal and part and parcel of substantive Islamic law or 'Hukum Syarak'. And as for the words 'or committees carrying out the functions under this Enactment' in s 66A, the relevant committee in the context of this petition would be the Fatwa Committee established in accordance with Part III of the ARIE. While the contents of a Fatwa and its interpretation in relation to 'Hukum Syarak' or personal law were matters purely within the jurisdiction of the Syariah Court, if there was a challenge as to whether a Fatwa was made in compliance with written law (whether Federal or State law or even the Federal Constitution) then it became a matter for the Civil Superior Courts to determine which alone could issue the necessary public law remedies (see paras 70 & 74–79).

(4) The relevant Hansard showed that in enacting s 66A, the SSLA intended to confer the power of judicial review upon the Syariah High Court. It was not apparent from the record that the power so conferred was only restricted to matters of Islamic law and not matters within the realm of public law and/or public law powers. Since the provision was cast in such general terms and without limitations, the court could not mend or re-make the statute. Its only duty was to strike it down and leave it to the SSLA, if it so desired, to re-enact the provision consonant with item 1 of the State List. In the circumstances, the doctrine of 'reading down' could not be applied to blow life into s 66A (see paras 83–84).

(5) The opening words of item 1 read: 'Islamic law and personal and family law of persons professing the religion of Islam'. This indicated that the ratione materiae jurisdiction of the Syariah Courts was intended only to cover the subject matter of personal laws which would by their nature apply only to natural persons. The word 'profess', in its natural and ordinary meaning, also suggested a declaration of faith, which was something an artificial or juridical person was incapable of doing. It therefore followed that item 1 could not have contemplated and was

never intended to confer judicial review powers on the Syariah Courts simply by defining MAIS as a 'Muslim'. By its very nature, judicial review involved supervising administrative bodies by reference to the public law powers vested in them. There was no regard to religion (see paras 88–90).

(6) Judicial review (constitutional and statutory) was exclusively a judicial power of the Civil Superior Courts in whom the judicial power of the Federation was solely reposed pursuant to art 121(1) of the Federal Constitution. Judicial review was not simply procedural law or a matter of procedure regulated completely by statute but a substantive and immutable component of judicial power — one which was inherent and which defined the very core function of an independent Judiciary to maintain check and balance in a system which observed separation of powers. Enabling Syariah Courts to exercise judicial review power was to assign unto them powers which had always been unique and exclusive to the Civil Superior Courts. Given the settled demarcation of the jurisdictions of the Civil and Syariah Courts, that demarcation would be obscured if the Syariah Courts were to also exercise and possess parallel powers of judicial review and the granting of public law remedies (see paras 24–25, 59, 62, 67 & 92).

[Bahasa Malaysia summary

Pempetisyen ('SIS'), yang merupakan sebuah syarikat yang diperbadankan di bawah Akta Syarikat 1965, telah memfailkan permohonan semakan kehakiman di Mahkamah Tinggi untuk mencabar kesahihan Fatwa yang yang dibuat terhadapnya. Mahkamah Tinggi menolak permohonan tersebut atas alasan tidak mempunyai bidang kuasa untuk mendengar perkara tersebut berdasarkan Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('ARIE') yang dibaca bersama perkara 121(1A) Perlembagaan Persekutuan. Melalui petisyen ini, SIS memohon perisytiharan bahawa s 66A ARIE adalah tidak sah, tidak berperlembagaan batal dan tidak sah kerana Dewan Undangan Negeri (DUN) Selangor telah menggubal undang-undang mengenai perkara yang berkenaan dengannya dan tidak mempunyai kuasa untuk menggubal undang-undang menurut perkara 1 Senarai Negeri dalam Jadual Kesembilan Perlembagaan Persekutuan. Seksyen 66A memperuntukkan bahawa 'Mahkamah Tinggi Syariah boleh, demi kepentingan keadilan, atas permohonan mana-mana orang, mempunyai bidang kuasa untuk memberi kebenaran dan mendengar permohonan semakan kehakiman ke atas keputusan yang dibuat oleh Majlis atau jawatankuasa yang menjalankan fungsi di bawah Enakmen'. 'Majlis' yang disebut dalam peruntukan tersebut adalah pencelah di dalam petisyen ini ('MAIS'), sebuah badan yang ditubuhkan dibawah ARIE, manakala 'jawatankuasa' yang dirujuk adalah Jawatankuasa Fatwa Negeri. Kedua-dua responden dan MAIS menghujahkan bahawa s 66A adalah sah dari segi perlembagaan. SIS, bagaimanapun, berhujah bahawa: (a) frasa 'orang yang menganut agama Islam' dalam perkara 1 Senarai Negeri

mesti merujuk kepada orang sebenar dan bukannya orang buatan dan, oleh itu, Mahkamah Tinggi Syariah dalam s 66A tidak mempunyai bidang kuasa semakan kehakiman ke atas MAIS walaupun ianya ditakrifkan sebagai 'Muslim' di bawah s 2 ARIE; dan (b) perkara 121(1) PP memberikan kuasa kehakiman menurut Perlembagaan Persekutuan di dua Mahkamah Tinggi — iaitu Mahkamah Tinggi Sivil yang ditubuhkan di bawah Bahagian IX PP — dan oleh itu hanya Mahkamah Tinggi Sivil yang mempunyai kuasa eksklusif untuk menjalankan semakan kehakiman (sama ada perlembagaan atau berkanun/pentadbiran) sedangkan Mahkamah Syariah yang digubal oleh Negeri tidak mempunyai kuasa seperti yang tertakluk di bawah perkara 1 Senarai Negeri. Responden dan MAIS berhujah bahawa istilah 'semakan kehakiman' dalam s 66A ARIE tidak mempunyai makna yang sama di bawah undang-undang sivil dan bertujuan untuk memberikan kuasa penyeliaan Mahkamah Tinggi Syariah hanya berkenaan dengan perkara-perkara yang berkaitan dengan undang-undang Syariah. Perkara ini selari dengan perkara 1 Senarai Negeri yang, antara lain, membenarkan penggubalan undang-undang yang berkaitan dengan 'perlembagaan, organisasi dan prosedur' Mahkamah Syariah. MAIS, di samping itu, menghujahkan bahawa semakan kehakiman adalah bersifat prosedur semata-mata, bahawa kuasa untuk melaksanakannya telah diberikan oleh statut dan ianya tidak diperuntukkan secara jelas dalam Perlembagaan Persekutuan atau mana-mana kuasa kehakiman mahkamah.

Diputuskan, membenarkan petisyen dan membenarkan perintah deklarasi yang dipohon:

(1) Bidang kuasa substantif Mahkamah Syariah tertakluk di bawah perkara 1 Senarai Negeri, Jadual Kesembilan Perlembagaan Persekutuan. Perkara 1 bukan sahaja peruntukan yang membolehkan tetapi juga menetapkan had kuasanya. Perkara 1 membenarkan Badan Perundangan Negeri menggubal undang-undang yang memberikan kuasa kepada Mahkamah Syariah mengenai bidang kuasa yang disebut dalam perkara 1 yang terpakai ke atas orang yang menganut agama Islam. Oleh itu, Mahkamah Syariah hanya mempunyai bidang kuasa undang-undang menurut undang-undang Negeri tertakluk kepada item-item di dalam perkara 1. Kuasa semakan kehakiman atau kuasa untuk memberikan remedi undang-undang awam bukanlah di dalam bidang kuasa item 1 Senarai Negeri. Seksyen 66A tidak tertakluk di bawah kuasa yang diberikan di dalam perkara 1 Senarai Negeri terhadap Mahkamah Syariah yang tiada kuasa terkandung di dalam item 1 Senarai Negeri. Oleh itu, s 66A adalah tidak berperlembagaan dan tidak sah kerana SSLA tidak mempunyai kuasa untuk membuat peruntukan tersebut (lihat perenggan 55, 58, 68 & 93).

(2) Perkataan yang digunakan Item Butiran 1 Senarai Negeri tidak dapat digunakan di luar asas tujuan utamanya. Perkataan 'perlembagaan, organisasi dan prosedur Mahkamah Syariah' perlu diteliti secara konteks.

Untuk 'membentuk dan mengatur' semata-mata bertujuan untuk mewujudkan atau menubuhkan Mahkamah Syariah dalam pelbagai peringkat. Responden nampaknya telah menggabungkan frasa 'perlembagaan, organisasi dan prosedur Mahkamah Syariah' dengan perkataan 'undang-undang Islam dan undang-undang peribadi dan keluarga orang yang menganut agama Islam' untuk berpendapat bahawa SSLA mempunyai kuasa untuk menggubal s 66A ARIE kerana ia hanya berkenaan dengan orang Islam (lihat perenggan 56–57).

(3) Pihak responden dan MAIS berhujah bahawa Mahkamah Syariah berhak untuk melakukan semakan kehakiman dengan alasan bahawa mereka dibenarkan untuk menghakimi perkara-perkara yang berkaitan dengan Hukum Syarak. Tetapi s 66A tidak berkaitan dengan perkara-perkara doktrin semata-mata atau yang berkaitan dengan agama Islam atau 'Hukum Syarak'; sebaliknya, ia memberikan kuasa yang lebih luas dari perkataan 'undang-undang Islam dan undang-undang peribadi dan keluarga orang yang menganut agama Islam' di dalam perkara 1 Senarai Negeri. Secara luarannya, s 66A, antara lain, berkenaan kuasa undang-undang awam MAIS. Kuasa MAIS, yang ditakrifkan dalam s 7 ARIE, dengan jelas melangkaui bidang undang-undang awam dan melibatkan kuasa undang-undang awam. Ianya melampaui isu doktrin dan sebahagian daripada undang-undang Islam substantif atau 'Hukum Syarak'. Dan bagi perkataan 'atau jawatankuasa yang menjalankan fungsi di bawah Enakmen ini' di dalam s 66A, jawatankuasa yang berkaitan dalam konteks petisyen ini adalah Jawatankuasa Fatwa yang ditubuhkan mengikut Bahagian III ARIE. Walaupun kandungan sesuatu Fatwa dan tafsirannya berhubung dengan 'Hukum Syarak' atau undang-undang peribadi adalah perkara semata-mata dalam bidang kuasa Mahkamah Syariah, jika terdapat cabaran sama ada Fatwa dibuat dengan mematuhi undang-undang bertulis (sama ada undang-undang Persekutuan atau Negeri atau Perlembagaan Persekutuan) maka adalah di dalam bidangkuasa Mahkamah Tinggi Sivil untuk menentukan memberikan remedi undang-undang awam yang diperlukan (lihat perenggan 70 & 74–79).

(4) Hansard yang berkaitan menunjukkan bahawa ketika penggubalan s 66A tersebut, SSLA bertujuan untuk memberikan kuasa semakan kehakiman ke atas Mahkamah Tinggi Syariah. Tidak jelas dari rekod tersebut bahawa kuasa yang diberikan hanya terhad kepada perkara-perkara undang-undang Islam dan bukan perkara-perkara dalam bidang undang-undang awam dan/atau kuasa undang-undang awam. Oleh kerana peruntukan secara umum dan tanpa batasan, mahkamah ini tidak dapat memperbaiki atau membuat semula peruntukan tersebut. Mahkamah ini mempunyai tanggungjawab untuk membatalkannya dan menyerahkannya kepada SSLA, sekiranya diperlukan, untuk menggubal semula peruntukannya agar selari dengan perkara 1 Senarai Negeri.

Dalam keadaan ini, doktrin 'bacaan' tidak boleh digunakan untuk menghidupkan s 66A (lihat perenggan 83–84).

(5) Kata-kata pembukaan perkara 1 berbunyi: 'Undang-undang Islam dan undang-undang peribadi dan keluarga orang yang menganut agama Islam'. Ini menunjukkan bahawa bidang kuasa Mahkamah Syariah hanya bertujuan untuk meliputi perkara undang-undang peribadi yang bersifat mereka hanya terpakai kepada orang sebenar. Perkataan 'memasuki', dalam makna asal dan biasa juga mencadangkan pengisytiharan keimanan, yang tidak dapat dibuat oleh orang buatan. Oleh itu, perkara 1 tidak dapat tidak memberikan kuasa semakan kehakiman ke atas Mahkamah Syariah hanya dengan mentakrifkan MAIS sebagai 'orang Islam'. Semakan kehakiman merupakan tindakan undang-undang untuk menyelia hal ehwal badan-badan pentadbiran dengan melibatkan kuasa undang-undang awam. Hal ini tidak tidak melibatkan hal ehwal agama (lihat perenggan 88–90).

(6) Semakan kehakiman (perlembagaan dan statutori) merupakan bidang kuasa esklusif Mahkamah Tinggi Sivil di mana kuasa kehakiman Persekutuan diberikan melalui perkara 121(1) Perlembagaan Persekutuan. Semakan kehakiman bukan sekadar undang-undang prosedur yang diberikuasa sepenuhnya oleh statut tetapi yang juga merupakan komponen kuasa kehakiman yang tidak boleh dicabar — Badan Kehakiman bebas untuk mengekalkan semak dan imbang dalam sistem pemisahan kuasa. Memandangkan terdapat persempadanan bidang kuasa mahkamah Sivil dan Syariah, persempadanan tersebut akan hilang sekiranya Mahkamah Syariah juga menjalankan dan memiliki kuasa semakan kehakiman yang serupa berkenaan kuasa remedi undang-undang awam (lihat perenggan 24–25, 59, 62, 67 & 92).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, FC (folld)
Huddart Parker & Co Pty Ltd & Appleton v Moorehead (1909) 8 CLR 330, HC (refd)
Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, FC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)

Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513, FC (refd)
Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal [2021] 1 MLJ 120, CA (refd)
Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)
Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383, SC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (folld)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (overd)
Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, FC (overd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (refd)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2, 4, 7, 48, 66A, Part III
Commonwealth of Australia Constitution s 71
Communications and Multimedia Act 1998 s 3(3)
Companies Act 1965
Courts of Judicature Act 1964 ss 25(2), 83, Schedule, para 1
Federal Constitution arts 4(1), (3), (4), 8(1), 10, 11, 74, 121(1A), 128(1), Ninth Schedule, Lists I, II, item 1, Part IX
Printing Presses and Publications Act 1984 s 7
Rules of Court 2012 O 53

Malik Imtiaz (Fahri Azzat, Surendra Ananth Anandaraju and Ameerul Aizat Noor Haslan with him) (Fahri, Azzat & Co) for the petitioner.
Salim Soib @ Hamid (Nur Irmawatie Daud and Muhammad Haziq Hashim with him) (Senior Federal Counsel, Selangor State Legal Advisor's Office) for the respondent.
Zainur Zakaria (Haniff Khatri, Abdul Rahim Sinwan and Noor Adzrie Mohd Noor with him) (Chambers of Zainul Rijjal) for the intervener.
New Sin Yew (Amerbon) watching brief for Bar Council of Malaysia.

Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This petition arose out of the decision of the High Court in an application for Judicial Review No WA-25–204–10 of 2014 ('JR No 204')

wherein the present petitioner (the applicant there) sought to challenge the validity of a fatwa dated 17 July 2014 (Ref No MAIS/SU/BUU/01–2/002/2013–3(4) and *gazetted* on 31 July 2014) ('Fatwa'). For completeness, the Fatwa is reproduced below:

> FATWA PEMIKIRAN LIBERALISM DAN PLURALISM AGAMA.
>
> 1. SIS FORUM (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalism dan pluralism agama adalah sesat dan menyeleweng daripada ajaran Islam.
> 2. Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalism dan pluralism agama hendaklah diharamkan dan boleh dirampas.
> 3. Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.
> 4. Mana-mana individu yang berpegang kepada fahaman liberalism dan pluralism agama hendaklah bertaubat dan kembali ke jalan Islam.

[2] In the JR No 204 application, the petitioner sought, among others, for the following declarations: (i) to the extent the Fatwa implicitly provides for offences in relation to newspaper, publications, publishers, printing and printing presses, it is contrary to s 7 of the Printing Presses and Publications Act 1984; (ii) to the extent it directs Malaysian Communication and Multimedia Commission ('MCMC') to block social website, is contrary to s 3(3) of the MCMC Act 1998; (iii) a declaration that the Fatwa is in excess of arts 10, 11, 74 and List I and List II of the Ninth Schedule of the Federal Constitution; and (iv) a declaration that the petitioner being a company limited by guarantee incorporated under the Companies Act 1965 or any other party not able to profess the religion of Islam, cannot be subjected to the said Fatwa.

[3] The High Court held, in part that is relevant to this petition, that in light of s 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the ARIE 2003') read with cl (1A) of art 121 of the Federal Constitution ('the FC'), the High Court was dispossessed of any jurisdiction to consider the validity of the Fatwa and that the question should instead be posed and determined in the Syariah High Court in accordance with s 66A of the ARIE 2003.

[4] By this petition, the petitioner sought for the following declaration:

> A Declaration that Section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is invalid on the ground that it makes provision with respect to a matter with respect to which the Legislature of the State of Selangor has

A no power to make, and as such, that said provision is unconstitutional, null and void.

[5] I must clarify at the outset of this judgment that this court is not concerned with the procedural or substantive validity of the Fatwa nor is it B asked to consider whether the courts are in the first place generally disempowered to undertake such evaluation under cl (1A) of art 121 of the FC. This petition concerns only the question of whether the Selangor State Legislative Assembly ('SSLA') was empowered to enact s 66A of the ARIE 2003. I therefore make no comment or ruling on the substantive or procedural C validity of the Fatwa.

BACKGROUND FACTS

[6] The salient facts of this petition narrated below are as gathered from the D cause papers and the parties' respective submissions with some modifications.

[7] The petitioner, SIS Forum (Malaysia), is a corporation who claimed to be aggrieved by the Fatwa. They accordingly filed an application for judicial review in JR No 204 which was dismissed. As adverted to above, the only E reason for the dismissal that is somewhat pertinent to the petition is that the learned High Court judge held that in light of cl (1A) of art 121 of the FC and s 66A of the ARIE 2003, the High Court had no jurisdiction to determine the validity of the Fatwa.

F **[8]** Taking the position that s 66A was invalid on the ground that the SSLA had no power to make it, the petitioner filed this petition upon obtaining leave from a single judge of this court under cll (3) and (4) of art 4 and cl (1) of art 128 of the FC.

G **[9]** In this connection, the said section 66A, which was inserted into the ARIE 2003 vide s 11 of the Administration of the Religion of Islam (State of Selangor) (Amendment) Enactment 2015, stipulates thus:

> H The Syariah High Court, may, in the interest of justice, on the application of any person, have the jurisdiction to grant permission and hear the application for judicial review on the decision made by the Majlis or committees carrying out the functions under this Enactment.

[10] The respondent, the Government of the State of Selangor takes the I position that s 66A of the ARIE 2003 is constitutionally valid. The intervener, Majlis Agama Islam Selangor ('Majlis'), a body established by the ARIE 2003 and is subject to 'judicial review' by the Syariah High Court under s 66A of the ARIE 2003 and accordingly having interest in the matter, was granted leave to intervene to defend the validity of s 66A.

THE CRUX OF THE SUBMISSIONS

[11] It has been held and explained recently, following a long line of settled case law, that the original jurisdiction of this court is a very narrowly confined one and is limited only to the 'competency' of a legislature to pass an impugned law. 'Inconsistency' challenges (as opposed to 'incompetency' challenges) cannot be addressed to the original jurisdiction of the Federal Court. See specifically: *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 ('Iki Putra'), at [29]; and generally: *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh'); and *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

[12] With that in mind, I shall now attempt to summarise the crux of the parties' competing contentions with a view to crystallise and address the focal issue of this petition. Learned counsel for the petitioner, Dato' Malik Imtiaz, assailed the constitutional validity of s 66A of the ARIE 2003 on the following grounds.

[13] Firstly, learned counsel submitted that the 'Majlis' referred to in s 66A of the ARIE 2003 is not a 'person professing the religion of Islam' which is a phrase contained within item 1 of the Ninth Schedule of the State List, item 1 reads:

> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, *which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph*, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (Emphasis added.)

[14] Section 2 of the ARIE 2003 defines the word 'Muslim' to include the 'Majlis' established under s 4 of the same statute. Learned counsel for the petitioner argued, in essence that the definition of the word 'Muslim' in s 2 is

not in accord with item 1 of the State List because effectively only a natural person may 'profess' the religion of Islam. As such, the Syariah Courts cannot have jurisdiction over an artificial person.

[15] The next argument advanced by learned counsel for the petitioner is on the interpretation of the words 'judicial review' employed in s 66A of the ARIE 2003 and whether those words confer power on the State-legislated Syariah Courts in excess of the scope permitted by item 1 of the State List. Learned counsel argued that judicial review is a unique and exclusive aspect of judicial power vested in the Civil Superior Courts. This is also supported by cl (1) of art 121 of the FC (whether pre-amendment or as amended in 1988) which states to the effect that judicial power of the Federation shall vest in the two High Courts and by extension the appellate civil courts.

[16] After establishing in his submission that the civil courts are the only courts capable of judicial review, counsel for the petitioner argued that item 1 of the State List, even if construed in its widest sense, is incapable of being read to confer powers of judicial review on the Syariah Courts. He submitted that the substantive powers of the Syariah Courts carved out in item 1 are limited to the substantive matters relating to the religion of Islam and Malay custom (*adat Melayu*) as outlined in the said item 1.

[17] Learned counsel also argued that the Syariah Courts, as a matter of constitutional policy, are incapable of exercising judicial power for the reason that they do not share the same constitutional guarantees of judicial independence as the Civil Superior Courts.

ANALYSIS/DECISION

The concept of judicial review generally

[18] Given that the crux of s 66A of the ARIE 2003 relates to the words 'judicial review', I will start the discussion on the interpretation of those words.

[19] In my view, 'judicial review' is too broad and nebulous to be accorded a set definition. It would be more appropriate to explain the concept, within the context of our FC, by first referring to the concept of 'judicial power' which is itself another nebulous term.

[20] The classic explanation of what 'judicial power' encompasses is the one by Griffith CJ in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330, where at p 357, his honour said:

> ... judicial power as used in sec 71 of the Constitution mean[s] the power which every sovereign authority must of necessity have to decide controversies between its

subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

[21] Section 71 of the Australian Constitution referred to by his honour Griffith CJ in the above passage provides thus:

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

[22] Reference to s 71 of the Australian Constitution is apposite because our pre-amendment cl (1) of art 121 is worded in similar fashion. The pre-amendment cl (1) of art 121 of the FC provided that:

121 Judicial power of the Federation

(1) Subject to Clause (2), the judicial power of the Federation shall *be vested in two High Courts of co-ordinate jurisdiction and status*, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine ...

and in such inferior courts as may be provided by federal law.

[23] Clause (1) of art 121, as it presently stands post-amendment vide Act A704 in 1988, reads as follows:

121 Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine ...,

and such inferior courts as may be provided by federal law; *and the High Courts and*

inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[24] This court has consecutively and consistently held in its decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo') that the judicial power of the Federation remains reposed solely in the civil courts.

[25] A fundamental aspect of judicial power is judicial review. In this country, judicial review has two broad aspects. The first is constitutional judicial review and the second is statutory judicial review (also known as administrative judicial review). Both versions of it are primarily grounded on the concept of the doctrine of ultra vires — and this is explained further below.

Constitutional judicial review

[26] Granted that there is no specific legislative entry on the conferral of jurisdiction on judicial review, having regard to constitutional supremacy and the general power of supervision by way of constitutional judicial review, I opine that the jurisdiction for judicial review was intended to be conferred on the Civil Superior Courts by way of the general empowering provision in cl (1) of art 4 of the FC and not by reference to the Legislative Lists in the Ninth Schedule.

[27] Constitutional judicial review is ingrained within cl (1) of art 4 of the FC which stipulates that the FC being supreme, any law inconsistent with it is void to the extent of the inconsistency with the FC. Two things are corollary to this mighty declaration. First, the Civil Federal Judiciary is the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC. This is by virtue of cl (1) of art 121 of the FC which stipulates that judicial power resides in the two High Courts — essentially the superior courts established under Part IX of the FC. This is the correct proposition of law whether pre-amendment or post-amendment of cl (1) of art 121.

[28] The second corollary feature of cl (1) of art 4 and the power to constitutionally review the validity of legislation is the concomitant power to review executive action. This makes sense as it is usually, but not always, the exercise of executive powers or discretions under written law that gives rise to

constitutional litigation. A successful attack on the validity of the impugned legislation might also invalidate, as a result, those executive powers or discretions.

[29] Constitutional judicial review if compared conceptually to judicial review generally in the United Kingdom, is a concept unique to Malaysia due to the fact that Malaysia has a written constitution which declares itself supreme. The effect of it, in a setting like ours where the FC is supreme and not Parliament, is not only that all legislation passed are subordinate to the FC, but the very maker of the impugned legislation (Parliament or the State Legislatures) are also subordinate to the FC having derived their existence from it.

[30] These observations are not novel. The existence of constitutional judicial review as an inherent function of the judicial arm of Government established under Part IX of the FC was recognised by this court by a majority of 8–1 in *Iki Putra*. Although this court did not use the term 'constitutional judicial review' (as it was not necessary to do so on the facts of that case), the majority nonetheless made the following observations as regards the interplay between cl (1) of art 4 and cl (1) of art 121 of the FC:

> [64] ... in light of the judgments of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, *in all cases, the Civil Superior Courts retain supervisory jurisdiction which is inherent in their function under arts 4(1) and 121(1) of the FC*. Thus, unless their jurisdiction is very clearly excluded by virtue of subject-matter under art 121(1A), the question that the Civil Superior Courts have no jurisdiction to determine any form of dispute does not arise. (Emphasis added.)

[31] Within the context of constitutional judicial review, the structure and architecture of the FC makes it quite plain that it is only the Federal Civil Superior Courts that possess supervisory jurisdiction over all manner of legislation passed by any Legislature — whether Federal or State. The first indication of this is the general and broadly worded phrase in cl (1) of art 4 ie the words 'any law passed after Merdeka Day'. That this power was always intended to be reposed in the civil courts is apparent from the following portion of the Reid Commission Report 1957 reflecting the intention of the drafters of our FC, as follows:

> 123 ... First, we consider that the function of interpreting the Constitution should be vested not in an ad hoc Interpretation Tribunal, as provided by the Federation Agreement, but (as in other federations) in the ordinary courts in general and the Supreme Court in particular. The States cannot maintain their measure of autonomy unless they are enabled to challenge in the courts as ultra vires both Federal legislation and Federal Executive acts. Secondly, the insertion of

Fundamental liberties in the draft Constitution requires the establishment of a legal procedure by which breaches of those Fundamental Liberties can be challenged.

[32] The fact that the superior courts are the only bodies capable of deciding constitutional issues or issuing public law remedies has also been made plain in decided cases. In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, the Supreme Court noted that the subordinate courts (magistrates' and sessions courts) are incapable of exercising any supervisory powers over the powers of the public prosecutor (at pp 548–549).

[33] Second, that judicial review is a feature unique to the civil courts is confirmed by this court where it was held in *Semenyih Jaya* and *Indira Gandhi* that despite the change in language in cl (1) of art 121 of the FC post-amendment, the judicial power of the Federation remains vested in the Courts established under Part IX of the FC.

[34] Finally, and again in reference to the Reid Commission Report and cl (1) of art 4, it would appear that in a federalist system of government, with only a single federal judicial structure, it is only appropriate that the Federal civil courts exercise that power. The very fact of the concentration of certain powers in the federal system was recognised by Azahar Mohamed CJM in his concurring judgment in *Iki Putra*, as follows:

> [110] *Undeniably, the federal-state relationship and allocation of powers reveal a FC with a central bias*. The structure created in 1957 clearly bestows a preponderance of power on the centre (see 50 years of Malaysia, Federalism Revisited, Edited by Andrew J Harding and James Chin (at p 26). (Emphasis added.)

Statutory judicial review

[35] While constitutional judicial review essentially concerns the invalidity of legislative and/or executive conduct to the extent that they are in excess of constitutionally permissible limits, statutory judicial review encompasses all other forms of judicial review that is not constitutional judicial review. It covers a wide spectrum of actions which includes but is not limited to actions challenging executive orders, decisions and/or discretions; the decisions of inferior tribunals for example the Industrial Court; whether any subsidiary legislation is invalid on the grounds that it is ultra vires the parent statute, and so on. The list is inexhaustive.

[36] Again, statutory judicial review cannot be defined outright but can be discerned from its features. These features include having a prayer for relief seeking any or all of the remedies specified in para 1 of the Schedule to the CJA 1964 premised on any of the usual grounds for judicial review to wit, illegality, procedural impropriety, irrationality or proportionality.

[37] Statutory judicial review is different from constitutional judicial review because statutory judicial review applications involve supervising and checking the exercise of public law powers without a prayer per se for the invalidation of any statutory provision. A public law power may itself be a constitutional power but without any prayer for invalidation of the primary or parent Act, such an application would still be considered statutory judicial review.

[38] A recent example of this would be the decision of this court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209. There, the attorney general cum public prosecutor's discretion to charge an accused person under cl (3) of art 145 of the FC was challenged on the traditional grounds of judicial review highlighted earlier. Even though the power was sourced from the FC, I consider the challenge in that case a statutory judicial review.

[39] Thus, the nature of the review whether constitutional or statutory is not determined by reference to the law claimed to have been breached. What matters in the ultimate assessment is the nature of the remedy sought.

[40] Statutory judicial review, as opposed to constitutional judicial review, is also labelled 'statutory judicial review' because the specified powers to afford redress, though inherent in the Judiciary's constitutional functions, are substantively in statutory law, foremost of which is s 25(2) of the CJA 1964 read with paragraph 1 of the Schedule and regulated procedurally by O 53 of the Rules of Court 2012 ('the ROC 2012').

[41] The means for redress for constitutional judicial review, however is provided directly under cl (1) of art 4 of the FC to strike down unconstitutional legislation with the further codified powers under statutory law of general application ie para 1 of the Schedule to the CJA 1964 to issue declarations and to mould relief in applications for judicial review filed pursuant to O 53 of the ROC 2012.

[42] Thus, the procedure for constitutional and statutory judicial review is governed by ordinary statutory law such as the CJA 1964 as may be further supplemented by O 53 of the ROC 2012.

Significance of judicial review and Interpretation of Item 1 of the State List, Ninth Schedule

[43] Having attempted to explain the basic concepts of constitutional and statutory judicial review, it would now be appropriate to determine the importance of those concepts insofar as they relate to the present discussion.

[44] On the significance of judicial review, I can do no better than echo the following dictum of Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, at pp 386–387, as follows:

> When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. *The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action*. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law. (Emphasis added.)

[45] Judicial review is thus a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This is because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance.

[46] Judicial review — whether constitutional review or statutory review — is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of government can perform its constitutional function vis a vis the other branches of government.

[47] At the risk of repetition, in line with decided cases, the judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts. Specifically, this court has definitely decided this point in *Indira Gandhi* wherein Zainun Ali FCJ observed thus:

> [45] In the first question, the appellant is challenging the administrative power exercised by the Registrar of Muallafs under the Perak Enactment with regard to the registration and issuance of the certificates of conversion of the three children. It is important that this is emphasised. That the appellant in the question posed is not questioning the conversion itself but the process and legality thereof. The issue to consider is whether the registrar acted with fidelity to its empowering statute in arriving at his decision; and in answering this question, is there need to exhort to intensive forensic study of the same, and whether a more nuanced approach can be taken.
>
> [46] Section 25 and para 1 to the Schedule of the Courts of Judicature Act 1964 ('the CJA') and O 53 of the Rules of Court 2012 confer jurisdiction on the High Courts to exercise supervisory powers. *The Syariah Courts are not conferred with the*

power to review administrative decisions of the authorities. (Emphasis added.)

[48] For the avoidance of doubt, the above passage from the judgment forms the ratio decidendi of the case as it was directly relevant to the first of three questions of law posed for the court's determination. The said first leave question which was answered in the affirmative is reproduced:

> Whether the High Court has the exclusive jurisdiction pursuant to ss 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 (read together with O 53 of the Rules of Court 2012) and/or its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment 2004.

[49] The above is also confirmed by the Reid Commission Report cited earlier and the observations of Azahar Mohamed CJM in his separate judgment in *Iki Putra* on how the FC centralises power in the Federal structure and if I may observe within the context of the Judiciary, this is certainly the case with judicial power — a central tenet of which is judicial review.

[50] The respondent submitted (and the intervener appears to support it) that the term 'judicial review' employed in s 66A of the ARIE 2003 is not the same as 'judicial review' in the civil law sense.

[51] To support that argument, the respondent placed significant emphasis on item 1, State List, Ninth Schedule of the FC and cl (1A) of art 121 of the FC to emphasise that 'judicial review' within the context of s 66A refers only to Syariah law and the Syariah Courts' supervisory powers on that subject-matter alone. The respondent also referred to the said item 1 to contend that another provision there confers such jurisdiction, namely, the portion of it which refers to the constitution and organization of the Syariah Courts.

[52] The two relevant portions of item 1 referred to are broken down below (which I have, for the purposes of this petition classified as limb 1 and limb 2 respectively), as follows:

> Item 1, State List, Ninth Schedule...
>
> ... Islamic law and personal and family law of persons professing the religion of Islam ... ('limb 1')
>
> and
>
> ... the *constitution, organization and procedure of Syariah courts*, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in

A respect of offences except in so far as conferred by federal law ... ('limb 2'). (Emphasis added.)

[53] In my view, neither of the two limbs can reasonably be construed as conferring power on the SSLA, in the manner suggested by the respondent, to B enact s 66A of the ARIE 2003 to the extent that it enables the Syariah Court to engage in 'judicial review'. I shall address limb 2 first.

[54] The phrase 'constitution, organization and procedure of Syariah Courts' received some judicial attention in the following passage of the C judgment of Abdul Hamid Mohamad FCJ (as he then was) in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101:

> [43] What it means is that, the Legislature of a State, in making law to 'constitute' and 'organize' the syariah courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited D only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the syariah courts. It can never be that once the syariah courts are established the courts are seized with jurisdiction over all the matters mentioned in E item 1 automatically. It has to be provided for. At the very least, the law should provide 'and such courts shall have jurisdiction over all matters mentioned in item 1 of List II — State List of the Ninth Schedule'. If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to 'constitute' and 'organize' the syariah courts. Would there be Syariah courts F without such law? Obviously none. That is why such law is made in every State eg Administration of Islamic Law Enactment 1989 (Selangor).

[55] While the respondent relies on the above passage in support of their position, the case, in my view, is against them and rebuts their contention. The G passage clarifies that the substantive jurisdiction of the Syariah Courts is strictly defined by item 1, State List, Ninth Schedule. Reading the above passage another way, what it means is this. Item 1 is not only an enabling provision but also establishes its own limits on what it enables. Item 1 allows the State Legislature to enact State laws with the effect to establish and confer Syariah H Courts with the jurisdictions referred to in item 1 and that too only over persons professing the religion of Islam. The Syariah Court will therefore only become seized with those jurisdictions once it is conferred by the State law or laws and only those jurisdictions which item 1 allows. The power of judicial review or the power to grant public law remedies is noticeably absent in item 1 I of the State List.

[56] Taking heed from *Gin Poh*, each legislative entry must be construed as broadly and as widely as possible. This, however, does not mean that the words are capable of being stretched beyond their base or primary meaning and

beyond the context in which they appear.

[57] The words 'constitution, organization and procedure of Syariah courts' must therefore be appreciated in context. As correctly submitted by the petitioner, to constitute and organize merely means to create or establish the Syariah Courts in its different tiers. The respondent appears to have taken limb 2, that is the phrase: 'constitution, organization and procedure of Syariah Courts' and combined it with the words in limb 1, to wit: 'Islamic law and personal and family law of persons professing the religion of Islam' to argue that the SSLA may pass s 66A of the ARIE 2003 in the way that it is worded because it is only in respect of Muslims. For ease of reference, this is what the respondent states in their written submission:

> 24. ... peruntukkan di dalam butiran 1, Senarai II (Senarai Negeri), Jadual Kesembilan di atas, hendaklah dibaca secara menyeluruh yang mana pada dasarnya telah jelas memberikan bidangkuasa kepada Responden untuk menggubal undang-undang Syariah termasuk antara lainnya memberikan bidang kuasa untuk penubuhan organisasi dan prosedur Mahkamah Syariah yang berbidangkuasa terhadap orang-orang yang menganuti agama Islam.
>
> ...
>
> 41. Responden turut berhujah bahawa pendekatan 'pith and substance' perlu diambil dalam menilai seksyen 66A EPAIS 2003 yang mana bukanlah memberi kuasa Semakan Kehakiman setara seperti di bawah Akta Mahkamah Kehakiman, sebaliknya memberikan kuasa semakan kepada Mahkamah Syariah kepada keputusan-keputusan yang dibuat di bawah Undang-Undang Syariah yang mana jelas di bawah bidangkuasa Mahkamah Syariah.

[58] I shall address the 'hukum syarak' or limb 1 argument later in this judgment. But suffice to say that upon reading s 66A of the ARIE 2003 specifically and as a whole, I think it is incapable of being founded on item 1 of the State List, Ninth Schedule.

[59] The use of the words 'judicial review' alone and in a manner which enables the Syariah Courts to exercise such powers is itself to assign unto such courts powers which have always been unique and exclusive to the civil courts. The words: 'constitution, organization and procedure of Syariah Courts' cannot be stretched to confer such powers on the Syariah Courts. Further, given the settled demarcation of the jurisdiction of the Civil and Syariah Courts, the demarcation will be obscured, should the Syariah Courts exercise and possess parallel powers of judicial review and public law remedies.

[60] In the same vein I cannot agree with the submissions put forth by the intervener as addressed below.

[61] After citing the judgment of this court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, the intervener summarised their points, as I understand them, as follows:

1. Judicial review, having been derived from Order 53 of the ROC 2012, is procedural or adjectival law;
2. Judicial review is the procedure by which the High Court exercises its supervisory jurisdiction of judicial control over administrative or public bodies;
3. The supervisory power and jurisdiction relating to the procedure of judicial review are conferred by statutes (Acts of Parliament). They are not expressly provided for in the Federal Constitution and neither do they originate from any inherent judicial powers; and
4. The procedure of judicial review is not restricted or confined to disputes or matters of constitutional nature or having constitutional elements.

[62] I find myself unable to read *Ahmad Jefri* in the way the intervener has. For the reasons explained at length above on the conceptual differences and similarities between constitutional and statutory judicial review (specifically) and the nature of judicial review generally, I am not convinced that cl (1) of art 121 can be afforded such a reading in light of cl (1) of art 4 of the FC. In other words, in light of cl (1) of art 4 which declares that the FC is supreme and the Judiciary is the only organ responsible to ensure the supremacy of the FC, there is no need for an express provision or declaration to say that judicial review (no matter the form) is a judicial power reposed exclusively and singularly in the civil courts. The power, as alluded to earlier, is ingrained and inherent in the Civil Superior Courts.

[63] In further support of their assertions, the intervener also relied on the judgment of this court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 ('Kok Wah Kuan') for the proposition that since judicial review is not inherent in the power of the courts in that under cl (1) of art 121 it is governed by Federal law, then judicial review is not exclusive to the High Court as there are no laws that declare anything to that effect.

[64] It is my view that the intervener's reliance on *Kok Wah Kuan* is misplaced for the reason that *Kok Wah Kuan* is not good law and is thus not a binding precedent. This is because this court, in *Semenyih Jaya* and *Indira Gandhi* has unanimously and consistently departed from the majority judgment's ratio of *Kok Wah Kuan* on how cl (1) of art 121 as it presently stands can be read so literally. The clear and consistent departure from *Kok Wah Kuan* is also apparent in cases decided after *Semenyih Jaya* and *Indira Gandhi* namely in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561

and *Alma Nudo*.

[65] It would also be recalled that in *Iki Putra* reference was made to the judgment of this court in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354 ('Sulaiman Takrib') where it was suggested at [45]–[48] that the jurisdictions of the courts were strictly circumscribed by federal law due to the presently worded cl (1) of art 121 of the FC. And, this court held in an 8–1 majority that this statement of the law in *Sulaiman Takrib* is no longer the position of the law in light of *Semenyih Jaya* and *Indira Gandhi*.

[66] Thus, it must be emphasised again that the statement of law in *Kok Wah Kuan* and *Sulaiman Takrib*, which are substantially the same: ie to read cl (1) of art 121 literally, is no longer correct having been departed from in the slew of cases that came after, including *Iki Putra.* Clause (1) of art 121 must be read harmoniously with cl (1) of art 4 and this means that the Judiciary's inherent power of review cannot be abrogated or delegated to some other body.

[67] It follows that there is no basis in law for the intervener's submission. Judicial review is not simply 'procedural law' or a matter of procedure regulated completely by statute. As explained, it is a substantive power that strikes at the heart of judicial power and the Judiciary's inherent and expected function of check and balance in a system which observes separation of powers — principally the notion that the judicial arm of government is to be completely independent of all the other branches. Order 53 of the ROC 2012, the CJA 1964 and related written laws are merely to facilitate the process of judicial review but cannot be said to be the basis of such powers.

'Hukum Syarak' and the Syariah Courts

[68] To my mind, the said s 66A is incompatible with the legislative lists for the reason that the provision when read as a whole confers power on the Syariah Courts far beyond what item 1 of the State List allows.

[69] For convenience, I reproduce s 66A with particular emphasis on the portions which are considered offensive:

> The Syariah High Court, may, in the interest of justice, on the application of any person, have the jurisdiction to grant permission and hear the application for judicial review on the decision made by *the Majlis or committees carrying out the functions under this Enactment.*

[70] I disregard, for the moment, the tail end of the section with the words: 'or committees carrying out the functions under this Enactment' and confine

myself just to the word 'the Majlis' — the intervener. The argument by both the respondent and the intervener, premised on the assumption that 'judicial review' in s 66A of the ARIE 2003 is different from the term as understood in the civil law sense, appears to be that the Syariah Courts are entitled to engage in judicial review on the pretext that they are allowed to adjudicate on matters relating to 'hukum syarak'.

[71] This court has in recent decisions, clarified the scope of judicial review when it concerns matters pertaining to religion. Where a matter concerns public law powers specifically, questions of obligations and compliance or non-compliance with written law are subject to judicial review no matter the essence of the original subject matter. It should be evident that written law here includes both federal and State laws. Two cases aptly illustrate this.

[72] The first of such cases is the decision of this court in *Indira Gandhi*. There, the appellant challenged the conversion of her children to the religion of Islam by her husband without her prior consent. This court held in essence that it was not concerned with the dogmatic aspects of the religion, to wit, whether the spiritual and religious aspects of it evinced a conversion but was instead concerned with the statutory exercise of discretion by the Registrar of Muallafs, Perak. This cautious distinction was articulated thus:

> [107] It is not disputed that the Registrar of Muallafs was exercising a statutory function as a public authority under the Perak Enactment in issuing the said certificates. As had been clearly manifested earlier, the jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or federal legislation as well as the Constitution, lie squarely within the jurisdiction of the civil courts. This jurisdiction, which constitutes the judicial power essential in the basic structure of the Constitution, is not and cannot be excluded from the civil courts and conferred upon the Syariah Courts by virtue of art 121(1A).
>
> [108] We need to emphasise this. *That the determination of the present appeals does not involve the interpretation of any Islamic personal law or principles*. This has to be made clear. The yardstick to determine the validity of the conversion is the administrative compliance with the express conditions stated in ss 96 and 106 of the Perak Enactment, namely the utterance of the affirmation of faith (the *Kalimah Syahadah*) and the consent of the parent. *The subject matter in the appellant's application is not concerned with the status of her children as Muslims converts or with the questions of Islamic personal law and practice, but rather with the more prosaic questions of the legality and constitutionality of administrative action taken by the registrar in the exercise of his statutory powers*. This is the pith of the question at hand. (Original emphasis.)

[73] Observations of a similar nature were also made by this court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza'). It was held that matters which require constitutional (and by extension statutory) interpretation are within the exclusive jurisdiction of the civil courts. The more

specific issue there was the difference between someone who was 'never' a Muslim which is a question of constitutional identity whereas questions relating to whether a person is 'no longer' a Muslim are for the exclusive jurisdiction of the Syariah Courts. The distinction must always be understood and appreciated within the context of the facts of each case.

[74] In terms of subject matter, s 66A of the ARIE 2003 as it stands, confers powers wider than what can reasonably be encompassed within the words 'Islamic law and personal and family law of persons professing the religion of Islam' in item 1 of the State List. Section 66A in its present form, does not relate to purely doctrinal matters or those relating to the religion of Islam. I cannot, therefore, appreciate the argument that they relate to 'hukum syarak' rather, on the face of it, I am of the view that it relates to the public law powers of the Majlis.

[75] Section 7 of the ARIE 2003 which defines the powers of the Majlis fortifies my view. It states as follows:

> 7 The duty of the Majlis for the economic and social development of Muslims.
>
> (1) It shall be the duty of the Majlis to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community in the State of Selangor consistent with Hukum Syarak.
>
> (2) The Majlis shall have power, for the purpose of the discharge of its duty under subsection (1) —
>
> (a) to carry on all activities, which does not involve any element which is not approved by the religion of Islam, particularly the development of commercial and industrial enterprises, the carrying on of which appears to the Majlis to be requisite, advantageous or convenient for or in connection with the discharge of such duty, including the manufacturing, assembling, processing, packing, grading and marketing of products;
>
> (b) to promote the carrying on of any such activities by other bodies or persons, and for that purpose to establish or expand, or promote the establishment or expansion, of other bodies to carry on any such activities either under the control or partial control of the Majlis or independently, and to give assistance to such bodies or to other bodies or persons appearing to the Majlis to have the facilities for the carrying on of any such activities, including the giving of financial assistance by way of loan or otherwise;
>
> (c) to carry on any such activities in association with other bodies or any person, including the department or authorities of the Federal Government or the Government of any State or as managing agent or otherwise on behalf of the State Government;

A (d) to invest in any authorised investment as defined by the Trustee Act 1949 [Act 208], and to dispose of the investment on such terms and conditions as the Majlis may determine;

(e) to establish any scheme for the granting of loans from the Baitulmal to Muslim individuals for higher education;

B (f) to establish and maintain Islamic schools and Islamic training and research institutions;

(g) to establish, maintain and manage welfare home for orphans; and

C (h) to do such acts as the Majlis considers desirable or expedient.'

[76] It is apparent that these powers tread quite clearly into the realm of public law and involve public law powers. They transcend beyond what can reasonably be considered as doctrinal and part and parcel of substantive Islamic D law or 'hukum syarak'.

[77] I now turn my attention to the remainder of the words in s 66A of the ARIE 2003 namely 'or committees carrying out the functions under this Enactment'. In the context of this petition, the relevant 'committee' would be E the Fatwa Committee established in accordance with Part III of the ARIE 2003. Section 48 in particular details the procedure to be followed for the making of a fatwa. Naturally, there is a difference between the making of a fatwa (as in the procedure and law to adhere to) and the substantive contents of F the fatwa.

[78] As regards the procedure, it necessarily requires compliance with written law and the failure to do so might result in the issuance of public law remedies that can only be issued by the Civil Superior Courts. The contents of G the fatwa and their interpretation are a different story and a matter purely for the jurisdiction of the Syariah Courts to the extent that it relates to 'hukum syarak' or personal law and not matters which objectively might be taken to contradict any written law (federal or State statutes or even the FC for that matter).

H

[79] Thus, simply put, if the vires of any fatwa or the conduct of the Fatwa Committee is challenged purely on the basis of constitutional or statutory compliance, then it is a matter for the civil courts. If the question pertains to the matters of the faith or the validity of the contents of the fatwa tested against the I grain of Islamic law, then the appropriate forum for review or compliance is the Syariah Courts.

[80] The above is consonant with the intricate balance drawn between the civil courts on the one side and the Syariah Courts on the other — the latter

having powers over matters which relate only to personal law and *adat* in substance. See also the decision of the Court of Appeal in *Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal* [2021] 1 MLJ 120 ('Maqsood Ahmad') which judgment explains the historical reasons for this demarcation, the problems posed and how they ought to be addressed. *Maqsood Ahmad* is incidentally approved by this court in *Rosliza*.

[81] The propositions of law that I have stated above were in fact suggested and accepted by the intervener, the Majlis, themselves. Learned co-counsel for the intervener, Mr Haniff Khatri, however, submitted that s 66A may be read down to the extent that the Syariah Courts will abide by the clear demarcation of laws and will decide only matters that are substantially doctrinal. In that sense, he urged, that the provision is not unconstitutional.

[82] No doubt, the Syariah Courts are bodies of law established by the State enactments under the auspices of item 1 of the State List. They are and ought to be trusted to follow the law. That said, the constitutionality of provisions is tested against the language with which they were drafted and the powers they actually confer and not on guarantees given by counsel in the course of litigation. In this respect, I recall the timeless reminder issued by Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311. Though that reminder was issued within the context of the equality provision in cl (1) of art 8 of the FC, it is wide enough to cover all cases in which the constitutionality of a statutory provision is challenged as opposed to how it is applied or possibly applied. At p 319, His Lordship reminded thus:

> ... The power of the Public Prosecutor under section 418A is uncanalized, unconfined and vagrant. The Deputy however assures us that this power will only be exercised reasonably. Now this is exactly what happened in *Attorney-General v Brown* [1920] 1 KB 773 usually called the 'Pyrogallic Acid Case,' in which to complaints about the tremendous breadth of the authority contended for by the Government in the matter of statutory authorisation for the importation of goods, Sir Gordon Hewart, who was the Attorney General at that time, arguing for the Crown, put (at p 779) what has since become the stock of those who see no danger in Executive power being left uncontrolled (and this is quite ironic in view of his subsequent condemnation of similar apologists): 'The Government could be relied upon to see that the power was reasonably exercised'. Sankey J, however, had no difficulty in holding the Executive action illegal, and he pointed out (at p 791) that the Crown's argument that the Executive could be trusted begs the question, *for the court could concern itself only with the bare issue of the possession of the claimed power, and not whether it would be reasonably exercised.* (Emphasis added.)

[83] Section 66A is clear in its terms, namely it allows the Syariah Court to possess powers of judicial review. Based on the *Hansard of Dewan Negeri Selangor Yang Ketiga, Mesyuarat Pertama*, 7 April 2015, at p 116, that was indeed the legislative intention of the SSLA in enacting s 66A:

A Fasal 11 bertujuan untuk memasukkan seksyen baru 66A ke dalam Enakmen 1/2003 dengan memberikan kuasa semakan kehakiman kepada Mahkamah Tinggi Syariah.

B **[84]** It was not apparent on record that s 66A was intended to cover matters of Islamic law only and not matters within the realm of public law and/or public law powers. In my view, when the provision is cast in general terms and without limitations, it is not permissible for the court to either mend or remake the statute. Its only duty is to strike it down and leave it to the SSLA, if it so desires, to re-enact it consonant with item 1 of the State List. In the C circumstances of the present petition, the doctrine of 'reading down' cannot blow life into the section, to confer powers on the SSLA to enact such provision.

D **[85]** Further, as stated earlier, the provision must be assessed on those terms as drafted and not on the terms upon which those powers may be exercised. Guided by the reminder in *Yap Peng*, I am thus not prepared to read those words differently than what they mean with the view to save them from a declaration of unconstitutionality.

E 'Persons' professing the religion of Islam

[86] I now turn to briefly consider Dato Malik's argument that the definition accorded to 'Muslim' by s 2 of ARIE 2003 is not in conformity with item 1 of F the State List because effectively only a natural person may 'profess' the religion of Islam.

[87] As I understand it, the constitutionality of s 2 has not been challenged in this petition. Even if it was, the issue might only be addressed in the appellate G jurisdiction of this court and not its original jurisdiction as is presently invoked.

[88] Regardless, it is my view that the petitioner's argument is relevant within the context of the present competency challenge against s 66A of the H ARIE 2003. The opening words of item 1 read: 'Islamic law and personal and family law of persons professing the religion of Islam'. This indicates that the *ratione materiae* jurisdiction of the Syariah Courts was intended only to cover the subject matter of personal laws which would by their nature only apply to natural persons.

I **[89]** Further, the word 'profess' in its natural and ordinary meaning suggests a declaration of faith which is something an artificial or juridical person is incapable of doing (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).

[90] The interpretation of the phrase 'persons professing the religion of Islam' and reading the purpose of item 1 suggest that item 1 could not have contemplated and was never intended to confer judicial review powers on the Syariah Courts simply by defining the intervener as a 'Muslim'. Judicial review, by its very nature, involves supervising administrative bodies by reference to public law powers vested in them. There is no regard to religion.

[91] I, therefore, find that the attempt to confer jurisdiction of judicial review on the Syariah Courts by purporting to define the 'Majlis' as a 'Muslim' is beside the point notwithstanding s 2 of the ARIE, and s 66A of the same therefore stands unconstitutional.

CONCLUSION

[92] Judicial review is not merely procedural but a substantive and immutable component of judicial power — one which is inherent and which defines the very core function of an independent Judiciary. It is exclusively a judicial power of the Civil Superior Courts.

[93] Reading s 66A of the ARIE 2003 as it stands and upon analysing the basis for judicial review in this country, I find that s 66A of the ARIE 2003 is unconstitutional and void, as it is a provision which the SSLA has no power to make. I accordingly find that the petitioner has overcome the threshold of the presumption of constitutionality.

[94] My learned sisters and brothers in the coram have read the judgment in draft and have agreed that it be the judgment of the court.

[95] The petition is allowed and the following declaration as prayed for is unanimously granted:

> A Declaration that Section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is invalid on the ground that it makes provision with respect to a matter with respect to which the Legislature of the State of Selangor has no power to make, and as such, that said provision is unconstitutional, null and void.

[96] Pursuant to s 83 of the CJA 1964, there shall be no order as to costs.

Appeal allowed and declarations prayed for granted.

Reported by Ashok Kumar